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Supreme Court of the United States

OCTOBER TERM, 1937.

No. 242.

COMPANIA ESPANOLA DE NAVEGACION MARITIMA, S. A., Owner of the Spanish Steamship "NAVEMAR",
Petitioner,

—against—

Spanish Steamship "NAVEMAR", her engines, etc., and RAFAEL CRESPO, JOSE ARANA, MANUEL FREIRE, GASPAR LOPEZ and ANTONIO SANCHEZ,
Respondents,

(No appeal was taken by them)

FERNANDO DE LOS RIOS, Ambassador of the Republic of Spain, applicant appearing through Luis Careaga, Acting Consul General of Spain at New York, and Mr. Jesse L. Rosenberg, his counsel, to intervene and vacate a final decree so that the Ambassador might appear as claimant of the Steamship "Navemar" in this suit,
Respondent in this Court.

MOTION AND MEMORANDUM ON BEHALF OF PETITIONER CONCERNING OMISSIONS AND ERRORS CONTAINED IN SUPPLEMENTAL BRIEF FILED ON BEHALF OF RESPONDENT.

T. CATESBY JONES,
D. ROGER ENGLAR,
JAMES W. RYAN.

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Respondent in this Court.

Motion.

Respondent herein having filed a brief entitled "Supplemental Brief on Behalf of Respondent", in which there are several errors and omissions, petitioner moves the Court for leave to file a memorandum concerning omissions and errors contained in the supplemental brief filed on behalf of the respondent.

COMPANIA ESPANOLA DE NAVEGACION MARITIMA, S. A., Petitioner,

By T. CATESBY JONES,
D. ROGER ENGLAR,
JAMES W. RYAN,
Counsel.

Dated, New York, Jan. 12, 1938.

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Respondent in this Court.

MEMORANDUM ON BEHALF OF PETITIONER CONCERNING OMISSIONS AND ERRORS CONTAINED IN SUPPLEMENTAL BRIEF FILED ON BEHALF OF RESPONDENT.

1. At pages 2, 3 and 4 of Supplemental Brief on Behalf of Respondent, reference is made to Mr. Justice Bucknill's decision in the Admiralty Court, and the statement is made that:

> "The facts and proceedings in the 'Cristina' are in all material respects similar to those in the case which this Court is now considering, except that the seizure of the 'Cristina' took place in the territorial waters of Great Britain (Cardiff, Wales), whereas the 'Navemar' was in the actual possession of the Republic of Spain before the vessel had arrived in the territorial waters of the United States (Opinion, C. C. A., R. 232)" (Supplemental Brief on Behalf of Respondent, p. 2).

In passing, we submit, that there is not any finding that the "Navemar" was in the actual possession of the Republic of Spain, either before or after she arrived in the territorial waters of the United States.

The following statement of facts, printed in *The Cristina*, 59 Lloyd's List Law Reports 1, at page 3, shows that there is a very material difference between that case and the instant case; and as this statement is omitted from what is printed by respondent, it is reprinted here:

> "Counsel submitted that, apart from any further evidence, the evidence which was before the Court on July 30 was quite sufficient to resolve this case. The position now was that the four vessels with which the Court was concerned had been arrested in this country at the instance of the owners, and on July 14 the Spanish Government dismissed the master of the *Cristina* and appointed a new one. *Since that time the Government, through its agents, had been paying the master and crew of the Cristina, and there could be no doubt that the ship was in the actual possession of the Spanish Government.* That being so, the writ, issued on behalf of the owners, claiming possession of a vessel which was in the possession of the Spanish Government, impleaded the Government, and, on the strength of the authorities, Counsel asked his Lordship to set aside the writ and subsequent proceedings. An attempt had been made to bring into that Court a Government which, in law, could not be required to appear there, as a foreign Sovereign State could not be impleaded." (Italics ours.)

The writ sued out by the owners in the English courts was issued on July 22nd (Supplemental Brief on Behalf of Respondent, p. 8), or eight days after the Master and crew of the "Cristina" had been in the pay of the Government. And as it cannot be denied that petitioner in the present case paid the wages of the crew of the "Navemar" (R. 223-225), and as the record shows without contradiction that all the persons on board the "Navemar" were employees of petitioner (R. 160), the facts in *The Cristina* case are not "in all material respects similar to those in the case" at bar.

There is another important difference between *The Cristina* and the case at bar. It appears in *The Cristina*, as printed

in the supplemental brief on behalf of respondent, that the true captain of the "Cristina" was not on board, and that Captain Asolo, the new captain, was a representative of the Spanish Government, and was in charge of the "Cristina" when the possessory action in that case was commenced (Supplemental Brief on Behalf of Respondent, p. 8). Here it appears that no representative of the Spanish Government was on board at any time (R. 160).

2. At page 3 of Supplemental Brief on Behalf of Respondent, the decree of the Spanish Government of October 10, 1936, is for the first time referred to as a requisition. It is there stated: "In this affidavit (the Careaga affidavit,, R. 127), it is alleged that the 'Navemar' was *requisitioned* by the Spanish Government under a decree issued on October 10, 1936", etc. (Supplemental Brief on Behalf of Respondent, p. 3). (Italics ours.) The word "requisition" as a description of the decree, of October 10, 1936, is in sharp contrast to the words "expropriated" and "confiscation" used on pages 2 and 3 of respondent's main brief to denote the effect of the same decree. An explanation of this change in nomenclature may be found upon examining *The Cristina* case, as printed in supplemental brief on behalf of respondent. We there find that the courts dealt with *The Cristina* as a case of requisition. And in that case the Court was careful to state what it meant by requisition. Lord Justice Scott said:

> "A requisition does not import a change of property" (Supplemental Brief on Behalf of Respondent, p. 7).

Upon examination of the Careaga affidavit, we find two statements that the "Navemar" had "become the property" of the Spanish Government as a result of the decree of October 10, 1936 (R. 123). Also in the suggestion filed with the Court by the Spanish Ambassador, on which the first order to show cause was obtained, a statement is made that as a result of the decree of October 10, 1936, "the steamship 'Navemar' then and there became, and at all times since has remained, the property of the Republic of Spain" (R. 101). These citations establish beyond controversy that here we are dealing

with a case of confiscation which is of a penal nature, whereas in *The Cristina*, the Court was dealing with a requisition which is not penal.

3. It is stated in the Supplemental Brief on Behalf of Respondent:

> "The proceedings in the present case were started by an affidavit of Luis Careaga, Secretary of Embassy and Consul in Charge of the Consulate General of Spain in New York, New York (R. 127) who had been duly authorized by the Ambassador to make these representations" (R. 257) (Supplemental Brief on Behalf of Respondent, p. 3).

The fact is that on December 7, 1936, the suit commenced was by a libel for possession directed against certain members of the crew in the employ and pay of petitioner, who had wrongfully seized the vessel (R. 4). Oral testimony was taken in open court (R. 14-78). A final decree was entered on December 14, 1936 (R. 98). On December 16, 1936, a first application was made to open up the default of respondents and to permit the Ambassador to file a claim (R. 99-100). On January 8, 1936, a second application was made to open the default and to permit the Ambassador to file a claim (R. 118-119). We submit that to say that this second application to set aside a final decree of a court, which decree was entered upon proof taken in open court, constitutes starting a proceeding, is a plain abuse of language. This application was addressed to the District Court to open up a final decree entered upon proof. Obviously, to permit opening up such a decree, and to permit further proof, the applicant should make a strong showing. The District Court considered the showing inadequate for the reasons stated in its opinion (R. 165-174), and for that reason, in the exercise of a proper discretion, denied the application.

4. Respondent's counsel at page 4 of his Supplemental Brief, asserts that we have been guilty of "a serious error in quotation" as to the concession which he made in the District

Court. In the opinion of the District Court the following statement appears:

> "Pressed at the argument, counsel was compelled to concede that at most only a (fol. 268) 'constructive possession' could be asserted prior to the seizure in New York harbor" (R. 172).

No application was ever made by the respondent for a correction of this statement of fact appearing in the opinion of the District Court. Obviously, it is improper to suggest that the statement is in any way inaccurate when the suggestion of inaccuracy comes after argument has been completed in this Court. The statement that the Circuit Court of Appeals made a contrary finding, is wholly without foundation (R. 232).

CONCLUSION.

As heretofore stated, the order of the Circuit Court of Appeals should be reversed and the final decree of the District Court should be affirmed, with costs.

Respectfully submitted,

T. CATESBY JONES,
D. ROGER ENGLAR,
JAMES W. RYAN.

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Respondents in the District Court but not parties in the Circuit Court of Appeals or in this Court because of not having taken any appeal),

FERNANDO DE LOS RIOS, Ambassador of the Republic of Spain, applicant,
Respondent in this Court.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

ANTHONY V. LYNCH, JR.,
CHARLES W. HAGEN,
HORACE T. ATKINS,
Proctors for Respondent, Fernando de los Rios, Spanish Ambassador to the United States of America.

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FERNANDO DE LOS RIOS, Ambassador of the Republic of Spain, applicant,
Respondent in this Court.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

No complete statement of facts is contained either in the petition for writ of certiorari or in the brief in support thereof, and in order to supply the omissions and correct certain inaccuracies we submit herewith the following brief summary of the facts and of the proceedings in the Courts below:

Statement of Facts.

On September 11, 1936, the Spanish steamship "Navemar" sailed from New York. After stopping

at St. Thomas, Virgin Islands, at Rio de Janeiro and at Montevideo she arrived at Buenos Aires on October 9, 1936 (789).

On the 10th day of October, 1936, while the "Navemar" was in Argentina the President of the Republic of Spain issued a decree to the effect that the Republic of Spain expropriated the steamship "Navemar" owned by Compania Espanola de Navegacion Maritima, S. A. for use of the national public service, which decree provided, among other things, that the "Navemar" be managed by the Minister of Communications and Merchant Marine through the General Bureau of Merchant Marine. In said decree it was provided that the decree would become the law of the Government of Spain on publication of the decree in the Gaceta de Madrid. The publication took place on October 11, 1936. The decree provided that the fact of the attachment and "the consequent change of authority" should be noted on the documents of the vessel (545).

At Buenos Aires on October 16, 1936, the master of the "Navemar" received a cablegram from the Director of Navigation of the Republic of Spain informing him of the confiscation of the "Navemar" (72). On receipt of the cablegram, Martinez, the master of the "Navemar", presented himself to the Spanish Consul in accordance with the instructions received from the Director of the Spanish Merchant Marine (77). For the purpose of receiving additional cargo the "Navemar" proceeded from Buenos Aires to Rosario. The master of the "Navemar", Martinez, testified as follows:

> "I proceeded to Rosario. I wrote a letter back to Buenos Aires putting myself again at the dis-

posal of the Spanish Consul General, and proceeded to Rosario, since he gave me no other instructions" (78, 79).

At Rosario he loaded additional cargo consigned to the charterers, Linea Sud Americana, and deposited the ship's roll with the Consul (80). The "Navemar" then left Rosario on advices of the Maritime Commission because of impending low water (82). At the time of departure the Consul's office was closed and the ship departed without her roll and returned to Buenos Aires for additional cargo (83). The master then again reported to the Consul General at Buenos Aires and requested him to arrange to have the ship's roll sent by the Consul at Rosario to the ship's agents at Buenos Aires. The Consul at Rosario did not comply with this request, but instead forwarded the ship's roll to the Consul General at Buenos Aires (85).

The Consul General at Buenos Aires thereupon delivered the ship's roll, together with the ship's register (which during all this time had been in the possession of the Consul General at Buenos Aires), to the master of the "Navemar" (87). At the time of the delivery of these documents the attention of the master of the "Navemar" was called to an endorsement which had been made on each of these documents by the respective Consuls. On the ship's roll the Consul at Rosario made an endorsement, over his signature and official seal, which, translated, reads as follows:

"Through a cable dated 26 of the instant month from the Director General of the Merchant Marine this ship has become the property of the State through attachment according to the Decree of Oct. 10, 1936" (555, 556).

On the ship's register the Consul General at Buenos Aires made an endorsement, which translated from the Spanish reads as follows:

> "By cable dated the 15th of October of 1936 to the Spanish Embassy at this capital, His Excellency, the Minister of the Secretary of State, informs that this vessel passes to be the property of the Spanish Government by decree of confiscation published in the Gazette on the date of the 11th of the present month" (103).

As the Consul General at Buenos Aires had not as yet received specific instructions regarding the "Navemar" from the Director of the Merchant Marine at Madrid, he authorized the master to continue his voyage to New York (106). The master of the "Navemar" thereupon cabled the Director of the Spanish Merchant Marine confirming these instructions. The cablegram, translated, reads as follows:

> "General Director of Merchant Marine,
> Madrid
>
> Authorized by Consul General we sail for New York Greetings
>
> Signed MASTER 'NAVEMAR' "

(649).

On October 28, 1936, the "Navemar" sailed from Buenos Aires and on arrival at New York deposited her documents with the Collector of Customs at the Port of New York (650). Among these documents was the ship's register on which appeared the endorsement to the effect that the "Navemar" was owned by the Republic of Spain. The manifests of the "Navemar" (pp. 236, 237 and 238), which were also deposited with the Collector of Customs of the United

States, contained the notation that the "Navemar" was "owned as set forth in the register" (pp. 236, 237, 238). Hence, when the ship entered the Port of New York her documents showed that she was the property of the Republic of Spain.

After arrival at New York the master of the "Navemar" recognized and represented that he was operating the ship for the Republic of Spain even as late as December 7, 1936 (the date on which the libel was filed) when he wrote to the charterers of the ship, Linea Sud Americana, as follows:

> "On October 28, 1936, possession of the SS 'Navemar' was taken by the Spanish Government and the ship was confiscated by decree of October 10 published in the official Gaceta October 11 according to orders which I received at Buenos Aires on October 16, 1936 from the Director General of the Merchant Marine at Madrid.
>
> Since October 28th I have been generally under orders of the Spanish Government as given me by the Spanish Consul at Buenos Aires.
>
> Since October 28th. I have been operating under orders of the Spanish Government as given me by the Spanish Consul at Buenos Aires. While I was in Buenos Aires, on October 28th., I was shown the original of a letter, dated October 26th., addressed to Messrs. Garcia & Diaz, Ltda., S. A. de Representaciones Maritimas, Sarmientos 329, by the Spanish Consul there, reading as follows:
>
> 'Please be informed by this letter that as per information received from Madrid, through the Spanish Embassy in this Capital, the steamer consigned to you of the Compania Espanola de Navegacion Maritima, S. A. "Navemar"